

P-3146/NA-93-1026; P-3146/M-93-1084 ORDER GRANTING AUTHORITY TO RESELL
LONG DISTANCE SERVICE IN MINNESOTA AND USWC'S CENTRON SERVICE IN
USWC'S EXCHANGES

BEFORE THE MINNESOTA PUBLIC UTILITIES COMMISSION

Don Storm
Tom Burton
Marshall Johnson
Cynthia A. Kitlinski
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Chair
Commissioner
Commissioner
Commissioner
Commissioner

In the Matter of Firstcom, Inc.'s Request for a
Certificate of Authority to Resell Long
Distance Services in Minnesota

ISSUE DATE: July 20, 1994

DOCKET NO. P-3146/NA-93-1026

In the Matter of Firstcom, Inc.'s Request for a
Certificate of Authority to Resell Local
Exchange Telephone Services

DOCKET NO. P-3146/M-93-1084

ORDER GRANTING AUTHORITY TO
RESELL LONG DISTANCE SERVICE IN
MINNESOTA AND USWC'S CENTRON
SERVICE IN USWC'S EXCHANGES

PROCEDURAL HISTORY

On May 18, 1993, the Commission received a complaint that the Association of Long Distance Users, Inc. (ALDU) was reselling long distance telephone service in Minnesota without Commission authority. The matter is being processed in Docket No. P-3134/DI-93-478.

On October 13, 1993, counsel for Firstcom, Inc. (Firstcom or the Company) and ALDU filed a letter stating that as a result of a business rearrangement undertaken by ALDU, Firstcom would be filing for long distance authority and would assume certain services that ALDU had been providing.

On October 14, 1993, Firstcom filed a petition requesting a certificate of authority to resell long distance services in Minnesota. The matter was assigned to Docket No. P-3146/NA-93-1026.

On October 30, 1993, Firstcom filed a petition requesting a certificate of authority to resell local exchange service, specifically to resell U S West Communications, Inc.'s (USWC's) CENTRON service. The matter was assigned to Docket No. P-3146/M-93-1084.

On February 10, 1994, the Minnesota Department of Public Service (the Department) filed its reports and recommendations regarding the petitions in both dockets.

On June 28, 1994, the Commission met to consider these matters.

FINDINGS AND CONCLUSIONS

Petition for Authority to Resell Long Distance Service

Firstcom proposed to operate as an aggregator of AT&T and MCI long distance services: AT&T's Readyline, Masterline, and Megacom 800 service and MCI's Vnet service using either switched or dedicated access. The Company did not request authority to offer operator, alternative operator, or any other service.

Firstcom has provided all of the information required in the July 13, 1983 Order in Docket No. P-421/C-82-619. The Company has obtained a certificate to operate in the State of Minnesota from the Secretary of State's Office and maintains an 800 number that allows callers to reach Company customer representatives.

Firstcom does not require customer deposits or advance payments and stated that it intends to comply with requirements of the call completion rate set forth in Minn. Rules, part 7810.5400. A review of the Company's financial statements indicates no material concerns which would limit the Company's ability to provide service to Minnesota customers.

Petition for Authority to Resell CENTRON

Firstcom has requested authority to resell CENTRON. The Company characterized its petition as a request to expand its current offerings beyond private shared telecommunications services (PSTS) to resell CENTRON to other customers. In an Order issued this day in the Downtown investigation matter (Docket No. P-3162/CI-93-1331), the Commission found that Firstcom's current operation is not PSTS as defined in Minn. Stat. § 237.68 (1992). Hence, the Commission views Firstcom's instant petition as one seeking authority for its current and future expanded resale of CENTRON.

As a matter of further clarification, the resale found to be in the public interest in the Commission's January 19, 1993 Order in Docket No. P-999/CI-90-235 is resale of USWC's CENTRON in USWC's exchanges. See Order at page 19, Ordering Paragraph 2. Firstcom's application, therefore, is further understood to request authority to resell USWC's CENTRON in USWC's exchanges.

Firstcom's application meets the requirements of the Commission's January 19, 1993 ORDER AUTHORIZING THE RESALE OF CENTRON SERVICE in Docket No. P-999/CI-90-235. Customers will have access to 911 without charge. Directory assistance and operator services will be available at the same rates charged by USWC and/or AT&T. While Firstcom has authority to provide long distance service in Minnesota under this Order (see Ordering Paragraph 2) and customers may choose to obtain long distance service through Firstcom, the Company will not require its customers to subscribe to a particular toll provider and will not block access to any toll provider. Regarding rates, Firstcom submitted cost information indicating that its services are priced above cost. The Commission finds that the Company's proposed rates are reasonable.

Fitness Issues Applicable to Both Petitions

In determining whether granting a certificate of authority is in the public interest, the Commission appropriately considers factors relating to the fitness of the petitioner to operate under the regulation of the Commission. Since the Commission's regulation necessarily involves major responsibility for the regulated parties to recognize and respond to the regulatory framework (reporting requirements, requests for prior authority, etc.) the applicant's capacity for operating in such an environment is relevant.

1. Non-certificated Operation

In the Downtown investigation Order, the Commission found that Firstcom's current provision of telecommunications service (Downtown's former operation) is unauthorized. See In the Matter of a Commission Initiated Investigation into the Status of Downtown Telecom With Respect to the Resale of CENTRON Services, Docket No. P-3162/CI-93-1331, ORDER TERMINATING INVESTIGATION AND CLOSING DOCKET (July 20, 1994) at page 4.

At the same time, for reasons stated in that Order, including the Company's erroneous but good faith belief that it was a PSTS provider exempt from the certification requirement, the Commission chose not to pursue penalties against Firstcom for that activity. Order at page 4. In the current proceeding, for the same reasons cited in the Downtown investigation Order, the Commission does not believe that this activity is grounds for finding Firstcom unfit to provide telecommunications service in Minnesota.

2. Relationship to ALDU

The Department initially expressed concern regarding Firstcom's relationship with ALDU, a company identified by the Department as having provided telephone service without a certificate of authority in violation of Minn. Stat. § 237.16, subd. 4 and 237.74, subd. 12 (Supp. 1993). The president and owner of ALDU, David Steen, is the husband of the president and owner of Firstcom. Both companies share the same business address. Further, the Department cited the filed information that Firstcom's request to the Commission for authority to operate was the result of a business rearrangement by ALDU.

Despite that view, the Department recommended that the Commission not link Firstcom's certificate to any action taken regarding ALDU.

In fact, Firstcom has clarified in a subsequent filing that the business rearrangement involving ALDU did not take place. The Company reiterated previous statements that it will operate separately from ALDU and solicit its own customers. The Company stated affirmatively that there are no business agreements between Firstcom and ALDU. In the absence of information in the record linking the operations of the two companies, the Commission will consider Firstcom's request without regard to the outcome of the complaint proceeding against ALDU.

3. Violation of Minn. Stat. § 237.23 (1992)

A final area calling for analysis in terms of the fitness standard is Firstcom's purchase of Downtown without obtaining Commission approval. Minn. Stat. § 237.23 (1992) makes it unlawful for a telephone company to purchase the property of any telephone company doing business within the state of Minnesota without first obtaining the consent of the commission thereto.

Firstcom defended its failure to seek prior Commission approval by arguing that as PSTS providers, neither Downtown nor Firstcom were telephone companies. According to Firstcom, Minn. Stat. § 237.23 (1992) did not apply to this purchase.

The Commission finds that even if Downtown and Firstcom had been PSTS providers they were also telephone companies as defined in Minn. Stat. § 237.01, subd. 1 (1992) in May 1993 when the purchase took place. As such, they were subject to the pre-approval requirement of Minn. Stat. § 237.23 (1992).

In short, PSTS providers meet the definition of telephone companies because they furnish telephone service to the public. The Commission has never found otherwise. In fact, in a December 19, 1989 Order in Docket No. P-999/R-88-357, the Commission found after lengthy analysis that PSTS providers were telephone companies. The Commission concluded:

Applying the analysis adopted by the Minnesota Supreme Court in Northern Natural Gas Company, [292 N.W.d 759 (1980) at 764] to the instant case, the statutory definition of "telephone company" contains no exception for the sharers and revellers of local telephone service, nor does Minn. Stat. § 237.68 exempt these entities from regulation as telephone companies. Absent a statutory exemption, shared tenant service providers and other resellers of local telephone service that furnish telephone service to the public are telephone companies under Minn. Stat. § 237.01, subd. 2 (1988) and are, hence, subject to regulation as telephone companies by the Commission. In the Matter of a Rulemaking by the Minnesota Public Utilities Commission Governing Resale and Sharing of Local Telephone Service, DOCKET NO. P-999/R-88-357, ORDER (December 19, 1989), page 4.

At the same time, as discussed in the Downtown investigation docket (P-3162/CI-93-1331), both Downtown and Firstcom exhibited an erroneous but good faith belief that they were PSTS providers exempt from Commission jurisdiction altogether. Moreover, Firstcom is a small business whose failure in this respect appears isolated in nature. In these circumstances, the Commission does not view Firstcom's failure to seek prior approval for its purchase of Downtown as demonstrating lack of fitness to receive authority.

Commission Action

Based on the foregoing review and analysis, the Commission will grant Firstcom a certificate of authority to resell long distance and local service (CENTRON) in Minnesota. As indicated in the Downtown investigation Order, Firstcom's current provision of telecommunications service (formerly provided by Downtown) is not PSTS but will be authorized by this Order's grant of authority to resell CENTRON. Otherwise said, the authority to resell CENTRON granted in this Order covers both the Company's current operation (Downtown's former operation) and any new resale of CENTRON.

- As a certificated long distance reseller in Minnesota, Firstcom will be required to comply with all applicable statutes and Commission rules.
- As a certificated CENTRON reseller in Minnesota, the Company will be

required to comply with the requirements applicable to a telephone company of its size. See the Commission's January 19, 1993 ORDER AUTHORIZING THE RESALE OF CENTRON SERVICE in Docket No. P-999/CI-90-235, pp. 14-16 and Ordering Paragraph 6. For *example*, Firstcom will be required to file an annual report, participate in the TAP and TACIP programs, pay the Company's apportioned share of general regulatory expenses charged to telephone companies under Minn. Stat. § 237.295 (1992), file and update its tariffs or price lists and change its tariffs or price list on a company by company basis in compliance with the statutes and rules applicable to a telephone company of their size, obtain Commission approval before purchasing the property of any telephone company, and fulfill all the responsibilities that local exchange companies (LECs) or independent local exchange companies (ILECs) have toward their customers.

ORDER

1. Firstcom, Inc.'s (Firstcom's or the Company's) application for a certificate of authority to resell long distance service in Minnesota is granted. As a certificated long distance reseller in Minnesota, Firstcom shall comply with all applicable statutes and Commission rules.
2. Firstcom's application for a certificate of authority to resell U S West Communications, Inc.'s (USWC's) CENTRON service in USWC's exchanges is granted. As a certificated CENTRON reseller in Minnesota, the Company shall comply with the requirements applicable to a telephone company of its size.
3. Within 15 days of this Order, Firstcom shall file tariffs or price lists under which it proposes to resell long distance service and CENTRON.
4. This Order shall become effective immediately.

BY ORDER OF THE COMMISSION

Burl W. Haar
Executive Secretary

(S E A L)